APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

and

Civil Action No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

MEMORANDUM AND ORDER

BECHTLE, J., May 20, 1981:

In 1976 and 1977, the Delaware Valley Citizens' Council for Clean Air ("DVCCCA") and the United States, respectively, each brought a civil action to compel the Commonwealth of Pennsylvania and two of its agencies to establish a program for the inspection and maintenance of

automobile emissions systems ("I/M program"), which the plaintiffs contended was required by federal law. *See* 42 U.S.C. §7410c-5(c)(1)(B). At length, the parties entered into a consent decree, approved by this Court on August 29, 1978, which provided for the establishment, either by legislation or regulation, of an I/M program in Pennsylvania. As subsequently modified, that decree provided that the Commonwealth would commence inspections on May 1, 1980.

Presently before the Court are two motions filed by the Commonwealth. The first motion seeks a modification of the consent decree to provide for a further postponement of the I/M program's full implementation until January 1, 1983. The Commonwealth's second motion seeks an order staying the implementation of the I/M program pending the Court's determination of the motion for a modification of the decree. Both motions will be denied.

The Commonwealth's principal ground for seeking the delay is that, by waiting the additional 20 months, a more advanced emissions system analyzer, using a computer, will be available for use in the I/M program. The new computer analyzer, which is more expensive, is not now available and, though presumably more accurate than the less expensive available analyzer, the degree of added accuracy is neither necessary nor required by the United States Environmental Protection Agency ("EPA"). All parties, including the EPA, agree that existing analyzers, which are less expensive for the inspecting gas stations to buy, are adequate to fulfill the needs of the I/M program.

The parties submitted legal memoranda and a hearing was held on May 6, 1981, on the Commonwealth's

motions. In addition, the EPA, at the Court's request, submitted a brief report on the current air quality in the Philadelphia and Pittsburgh regions of the state. The report demonstrates that, while air quality in the two regions is improving or presently adequate in respect to some EPA standards, it continues to be wholly inadequate in respect to other EPA standards. For example, the ozone level in the Pittsburgh area not only fails to meet the standard, but has become worse over the past two years. In the Philadelphia area, the ozone level, while decreasing, is still at nearly twice the concentration permitted by the EPA standard. *See* EPA Report, Charts 1-5.

Therefore, upon consideration of the arguments of the parties and the EPA report, the Court has concluded that, notwithstanding the possible advantages of using the computer analyzer, the Commonwealth must establish the I/M program as set forth in the consent decree—*without further delay.*

Also before the Court is a motion filed by plaintiff DVCCCA requesting the Court to declare the defendants in violation of the consent decree, as modified, and to modify the consent decree. The modification sought would largely place supervision of the I/M program in the hands of the DVCCCA. Although the Commonwealth's delay in establishing the I/M program is disappointing and in large measure inexcusable, the Court does not believe that there are sufficient grounds at this time to either consider further or allow in whole or in part the drastic revision of the program proposed by the DVCCCA. Therefore, the motion of the DVCCCA will be denied.

An appropriate Order will be entered.

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UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ORDER

AND NOW, TO WIT, this 20th day of May, 1981, for the reasons stated in the foregoing Memorandum, IT IS ORDERED as follows:

1. The state defendants' motion for modification of the consent decree is *denied*.

2. The state defendants' motion to stay implementation of the consent decree is *denied*.

3. The motion of the Delaware Valley Citizens' Council for Clean Air to declare the defendants in violation of the consent decree, as modified, and to modify the

consent decree is *granted in part* and *denied in part:* (A) The motion is *granted* insofar as it seeks to have the defendants declared in violation of the consent decree, as modified, and the Court *so declares;* and, (B) the motion is *denied* insofar as it seeks a modification of the consent decree.

4. The state defendants are hereby *directed* to file with the Clerk of Court and serve, *on or before June 1, 1981,* a proposed plan for the Court's consideration, providing for the *immediate* implementation of the I/M program in accordance with the consent decree. Any *objections* thereto shall be filed with the Clerk of Court and served *on or before June 8, 1981.*

5. There will be a *hearing* on the state defendants' proposed plan, and any objections thereto, at *9:30 a.m., June 10, 1981,* in Courtroom *17B,* United States Courthouse, Philadelphia, Pa.

(s) Louis C. Bechtle
Louis C. Bechtle, J.

Entered: 5-21-81
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA

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COMMONWEALTH OF PENNSYLVANIA, et al.

MEMORANDUM AND ORDER

BECHTLE, J., June 16, 1981:

Presently before the Court is the Commonwealth's proposed Emission Inspection and Maintenance Plan, together with objections of the plaintiffs Delaware Valley Citizens' Council for Clean Air ("DVCCCA"), the United States of America and the Environmental Protection Agency ("EPA"), filed in response to the Court's Order of May 20, 1981. On May 20, the Court declared that defendants Commonwealth of Pennsylvania and the Secre-

taries of the Pennsylvania Department of Transportation ("PennDOT") and the Pennsylvania Department of Environmental Resources ("PennDER") were in violation of the Consent Decree in which defendants had agreed to establish an automobile emissions inspection and maintenance program ("I/M program") for the five-county Philadelphia and Pittsburgh areas to have commenced on May 1, 1981. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania,* Nos. 76-2068, 77-619 (E.D. Pa., May 20, 1981). On June 10, 1981, the Court held a hearing regarding the proposed plan. The Commonwealth's proposed emissions I/M program will be approved subject to the following modifications:

I. *Implementation of the Emissions I/M Program*

First, the Court approves the Commonwealth's proposal to use the BAR-80 emissions analyzer with an automatic data collection system. The BAR-80-ADC equipment is preferable to the BAR-74 equipment because of its superior increased cost efficiency and reporting accuracy, as well as its more certain adaptability to the testing of auto emissions for compliance with the new car warranty required by Section 207(b) of the Clean Air Act, 42 U.S.C. §7541(b).

Second, the Court believes that the I/M program can be fully implemented by May 1, 1982, through a sincere effort on the part of the Commonwealth and the cooperation of all parties involved.

The defendants have asserted in open court their sincere desire and interest in going forward with this program. Although certain of the plaintiffs challenge the

sincerity of these declarations, the Court believes that they have been made by the defendants responsibly and in good faith. If the Court is correct, the manner in which the defendants enter upon their obligations under this Order will soon be apparent and it is from there that it will be easily determined whether or not the Court's confidence and expectations have been well placed. The defendants surely have the resources, skill and the personnel to carry out what they say is their earnest goal. Time is the real test and, for purposes of this phase of this litigation, it commences at this time.

Third, defendants have informed the Court that 2,274 inspection facilities have already been certified under Phase I of the I/M program to date. Phase II of the certification process, which requires that each station purchase the approved emissions analyzer and hire a certified emissions mechanic, has yet to be completed. Since the Commonwealth has for some months been prepared for the training of certified emissions mechanics and the certification of new inspection stations, the Court finds that it is reasonable to require that the Commonwealth certify at least 3,000 inspection stations by the date of the implementation of this program—May 1, 1982.

II. *Program Quality Assurance*

Schedule B, §1(D) of the Consent Decree of August 30, 1978, requires that the Commonwealth and PennDOT commence the development and implementation of standards, procedures and regulations with respect to the "periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of

records." This provision was later modified to read that "periodic visits shall be unannounced and occur *at least* once every three (3) months for each inspection facility, unless the quality control procedures are modified pursuant to paragraphs 4, 6 and 8 of this schedule." *Modification of Consent Decree,* March 7, 1980, sch. S. ¶1(D). Accordingly, ¶¶4, 6 and 8 require that the Commonwealth prepare a study for review by plaintiffs on the cost-effectiveness and quality of monthly on-site inspections, as opposed to the Commonwealth's proposed quarterly visitations. The aforementioned modifications to the Consent Decree specifically provide that "[p]laintiffs reserve the right to challenge any such procedures *which are not as effective* as the results of monthly on-site visits by the Commonwealth." *Modification of Consent Decree,* March 7, 1980, sch. B, ¶8 (emphasis added). On July 31, 1980, PennDOT submitted the required study of quality control procedures to the EPA. PennDOT proposed a system of quarterly visitations and audits of the inspection facilities. However, the EPA report on the Pennsylvania Proposed I/M Surveillance System, issued on September 23, 1980, outlined numerous deficiencies and inadequacies of the proposed surveillance system. EPA strongly recommended that the Commonwealth adopt a system of monthly audits, which in the opinion of the EPA would still remain cost-effective. In light of this report and the inadequacy of the quarterly visitations proposal demonstrated therein, this Court finds at this time that the proposed quarterly visitation program would not be "as effective as the results of monthly visits." Therefore, the Court will require defendants to implement a quality assurance program consisting of monthly audits and visitations of the

certified emissions I/M stations. Should it be demonstrated from the results of experience following full implementation of this program that actual events warrant a change in the program, alternative programs will be considered by the Court.

III. *Consumer Protection Mechanism*

The Consent Decree, as modified, states that defendants will "[s]ubmit to Plaintiffs adopted policies for providing, as a consumer protection mechanism, facilities where official confirming inspections may be conducted independent of certified private garages *(i.e., at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of other facilities at the sole discretion of PennDOT)*, or an equally effective alternative, such as timely consumer complaint investigations by Commonwealth employees." *Modification of Consent Decree*, March 7, 1980, sch. B, ¶9 (emphasis added). The Commonwealth proposes to implement a consumer protection mechanism which involves a Central Complaint Office from which field investigators would investigate submitted complaints and possibly arrange vehicle emissions retesting or analyzer checks if deemed necessary. This Court believes, however, that it is extremely important that the I/M program be effective, which will include acquiring the confidence of citizens in the affected areas. Therefore, the Court finds that common sense dictates that the Commonwealth's proposed Central Complaint Office procedure would not rise to the level of "an equally effective alternative" as that of at least one official confirming inspection station in both the Philadelphia and Pittsburgh areas, as described in sch. B,

¶9 of the modified Consent Decree. The Court is simply convinced that, in the absence of demonstrable evidence to the contrary, a change in the originally envisioned mode is not warranted now. Therefore, the Court will require that the Commonwealth maintain at least one independent inspection facility in each of the Philadelphia and Pittsburgh areas as a base system for handling consumer complaints in those two widely separated areas. Should it be demonstrated at a later time that an alternative system would be just as effective in light of experience under the program, the Court will reconsider this matter.

IV. *Reporting Requirements*

Section 11 of the original Consent Decree requires that PennDOT submit specified quarterly reports to the plaintiffs "for the purpose of insuring compliance with this Consent Decree." *Consent Decree*, August 29, 1980, ¶11. PennDOT will still be required to provide these reports to plaintiffs. Such reports shall specifically outline the progress of defendants in implementing the I/M program.

Second, this Court will require that PennDOT submit progress reports to this Court on the first and fifteenth of every month hereafter or the first business day following such date if such date is a Saturday, Sunday or holiday, in order that the Court can effectively monitor the implementation of the approved I/M program. These reports will be required, *effective immediately*, and shall continue through December, 1981.

V. *Conclusion*

It has been almost three years from the date of the entry of the Consent Decree in which defendants agreed to implement an I/M program; yet we find that the Commonwealth has still failed to implement the agreed-to program. This program is vital to achieving federally established standards of air quality in the Philadelphia and Pittsburgh regions. The parties, by their consent in the current Decree, as well as their unanimous declaration in court that the program is to go forward, have acknowledged that the observance of these air quality standards are necessary to maintain the health and well-being of the residents in the Philadelphia and Pittsburgh areas. Since the Court anticipates the cooperation and best efforts of the Commonwealth and PennDOT in implementing this program, the Court will withhold a ruling at this time on plaintiffs' request for the imposition of sanctions for failure to comply with the approved program. An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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v.

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and

Civil Action No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ORDER

AND NOW, TO WIT, this 16th day of June, 1981, for the reasons stated in the foregoing Memorandum, IT IS ORDERED as follows:

1. Defendants' motion for reconsideration of the Court's Order of May 20, 1981, is *denied* for the reasons stated by the Court at the June 10, 1981, hearing.

2. The Commonwealth's Proposed Emission Inspection and Maintenance Program I is *approved, except as modified* hereinafter by this Order.

3. Pursuant to sch. B, §§1(D), 4, 6 and 8 of the Modified Consent Decree of March 7, 1980, defendants shall promulgate and implement standards, procedures and regulations pertaining to monthly audits and monthly on-site visitations of the certified emissions inspection and maintenance stations. Monthly audits will be required until such time, following the full implementation of the I/M program, as the Court finds that experience under the program warrants a change.

4. Pursuant to sch. B, §9 of the Modified Consent Decree of March 7, 1980, defendants shall promulgate and implement standards, procedures and regulations pertaining to the establishment of official confirming inspection stations for consumer protection, at least one of which shall be in the Philadelphia area and one of which shall be in the Pittsburgh area, with establishment of additional facilities at the sole discretion of defendants. Such a consumer protection program will be required until such time, following the full implementation of the I/M program, as the Court finds that experience under the program warrants a change.

5. Pursuant to §11 of the Consent Decree of August 29, 1978, defendants shall submit specified quarterly reports to plaintiffs which set forth the state of progress in the Commonwealth's implementation of the I/M program.

6. Effective immediately and through December, 1981, defendants shall file progress reports with the Clerk of Court on the first and fifteenth of each and every month (or the first business day following such dates if such date is a Saturday, Sunday or holiday). Such reports

shall detail the progress of each of the items shown on defendants' submitted Emission Inspection Program I (Recommended Plan).

7. Subject to the Decree, previous Order of this Court and the within Order, the proposed schedule of defendants for the implementation of the I/M program is hereby *approved* and its operation *shall commence on May 1, 1982,* subject to such further Order of this Court as may from time to time be made.

8. Defendants shall certify a minimum of 3,000 inspection stations in order to effectively implement this program.

9. Subject to the expectations of the Court that its Orders to date, including the within Order, will be complied with by the defendants, the Court will withhold a final ruling on plaintiffs' request for impositions of sanctions at this time.

(s) Louis C. Bechtle
Louis C. Bechtle, J.

Entered 6-17-81
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAR AIR, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

and

Civil Action No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ORDER

AND NOW, TO WIT, this 14th day of July, 1981, IT IS ORDERED that defendants' motion for reconsideration of the Order of June 16, 1981, is hereby *denied*.

(s) Louis C. Bechtle
Louis C. Bechtle, J.

Entered 7/17/81
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2303

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, *et al.*; AMERICAN LUNG ASSOCIATION OF PHILADELPHIA AND MONTGOMERY COUNTY; DELCHESTER LUNG ASSOCIATION; SIERRA CLUB, PENNSYLVANIA CHAPTER; FRIENDS OF THE EARTH OF THE DELAWARE VALLEY; CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL; QUINN, KEVIN; FARRELL, KAYSI; WEISS, RUTH G.; KLINKNER, JOHN; BIEZ, ELIZABETH S.; SHULMAN, MONA

v.

COMMONWEALTH OF PENNSYLVANIA; TRAIN, RUSSELL E., Individually and as Administrator of the Environmental Protection Agency, *et al.*; SHERLOCK WILLIAM T., Individually and as Secretary of the Pennsylvania Department of Transportation; GODDARD, MAURICE K., Individually and as Secretary of the Pennsylvania Department of Environmental Resources; SNYDER, DANIEL J., III, Individually and as Regional Administrator of the Environmental Protection Agency, Region III

(D.C. Civil No. 76-2068)

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, the PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, Secretary of the Pennsylvania Department of Transportation; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, Secretary of the Pennsylvania Department of Environmental Resources

(D.C. Civil No. 77-0619)

Commonwealth of Pennsylvania, *et al.*,
Appellants

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued February 2, 1982

Before: GIBBONS, WEIS and GARTH, *Circuit Judges*

(Opinion Filed March 1, 1982)

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OPINION OF THE COURT

GARTH, *Circuit Judge.*

On August 29, 1978, after two years of litigation over the Commonwealth of Pennsylvania's alleged failure to comply with the Clean Air Act of 1970, 42 U.S.C. §§7401 *et seq.*, the Commonwealth and its Departments of Transportation and Environmental Resources consented to a decree in federal court. The two other parties to the decree were the Delaware Valley Citizens' Council for Clean Air and the United States. The decree provided for the establishment and implementation of a program for the inspection and maintenance of automobile emissions systems (the "I/M program") with the aim of reducing the level of carbon monoxide and ozone pollution in the Philadelphia and Pittsburgh areas. In this appeal, the Commonwealth challenges three orders entered by the district court which relate to that decree.

The first order, entered May 20, 1981, denied a request by the Commonwealth for a 20-month extension of the deadline for implementation of the I/M program and declared the Commonwealth to be in violation of the consent decree. The second order, filed June 16, 1981, modified the consent decree to require monthly state audits of emissions inspection stations, the establishment of two official "referee" stations to handle consumer complaints, and the certification by the Commonwealth of at least 3,000 inspection stations by May 1, 1982. The third order, filed July 14, 1981, refused a Commonwealth request for reconsideration of the June 16 order.

We note at the outset that the Environmental Protection Agency's State Implementation Plan for Pennsylvania originally called for the implementation of an I/M program by May 1, 1975. 40 C.F.R. §52.2038(d)(6)(1981). That implementation date was subsequently extended by the consent decree and modifications of that decree, first to August 1, 1980, then to May 1, 1981, and ultimately to May 1, 1982. Thus, by the time the I/M program is to be implemented, on May 1, 1982, the program will already be *seven years* behind schedule.

Our scope of review on this appeal is narrow: whether, in its orders modifying and refusing to modify the consent decree, the district court abused its discretion. Because we find no abuse of discretion by the district court in this case, we will affirm each of the three orders in question.

I.

In April, 1973, the Pennsylvania Department of Environmental Resources submitted to the EPA, in accordance with the Clean Air Act, a proposed plan for meeting federal ambient air quality standards for carbon monoxide and ozone. As modified and promulgated by the EPA in November, 1973, this plan included a provision calling for the implementation of an I/M program by May 1, 1975. 40 C.F.R. §52.2038 (1981).[1] The Commonwealth petitioned this court to review some aspects of the plan

[1] The Clean Air Act Amendments of 1977 subsequently established a requirement that states implement I/M programs in regional air basins where federal standards for either carbon monoxide or ozone could not be reached by December 31, 1982. 42 U.S.C. §7502(b)(11)(B). The Philadelphia and Pittsburgh regions are in this category.

promulgated by the EPA, but did not seek review of the I/M requirement or of the May 1, 1975 date for implementation of the I/M program. *Commonwealth of Pa. v. EPA*, 500 F.2d 246 (3d Cir. 1974).

More than a year after the Commonwealth had been required to implement its I/M program, the Commonwealth had not yet undertaken to meet its obligation and the EPA, for its part, had not undertaken its mandatory duty to enforce the Commonwealth's obligation under the plan. Accordingly, on June 29, 1976, the Delaware Valley Citizens' Council for Clean Air instituted a citizens' lawsuit, under 42 U.S.C. §7604, against the Commonwealth and the EPA. Subsequently, the EPA was dismissed as a defendant when it agreed to file its own complaint against the Commonwealth, and the two cases were consolidated.

Following prolonged discovery and negotiations the parties reached agreement on a consent decree which the district court approved on August 29, 1978. App. at 24. The consent decree called for the establishment and implementation of a program in which all gasoline powered motor vehicles weighing 11,000 pounds or less registered in ten counties in the Philadelphia and Pittsburgh areas[2] would be inspected annually for excessive pollutants in their exhaust. Owners of vehicles failing the emission tests would be required to have maintenance performed on their vehicles to reduce their discharge of pollutants. Op-

[2] The affected counties are Philadelphia, Bucks, Chester, Delaware, and Montgomery Counties and Allegheny, Beaver, Butler, Washington, and Westmoreland Counties. Approximately 3.7 million vehicles would be subject to the I/M program. App. at 722.

eration of vehicles which were not in compliance with the I/M program would be prohibited, with fines assessed for violations. The I/M program was designed to achieve a substantial reduction in hydrocarbon and carbon monoxide exhaust emissions by December 31, 1987. By that time, it was projected that the exhaust levels would be 25 percent less than they would have been without the program.

The consent decree provided that the Pennsylvania Department of Transportation would first seek legislation instituting a "franchise" I/M system.[3] If the Pennsylvania legislature failed to enact such legislation by July 1, 1979, the Department of Transportation was to promulgate regulations providing for a "private garage" I/M system.[4] Consent Decree, Aug. 29, 1978, ¶4; App. at 30. The deadline for the implementation of the private garage system—the date when mandatory annual inspection of vehicles would begin—was originally set at August 1, 1980. *Id.* Sched. B, ¶7; App. at 46.

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[3] The consent decree defined the "franchise" system as

> an inspection/maintenance program in which the Commonwealth enters into a contract with a single person or entity to establish and operate the inspection aspects of the program for a geographic area or areas under the general administration of the Commonwealth and whereby the Commonwealth may also certify fleet operators, and motor vehicle dealers, who own, lease or operate at least 15 subject vehicles, to conduct inspections of subject vehicles owned, leased or operated by them.

Consent Decree, Aug. 29, 1978, ¶3(E); App. at 27-28.

[4] The consent decree defined the "private garage" system as "an inspection maintenance program in which the Commonwealth certifies a number of privately-owned facilities to perform the inspection of vehicles." *Id.* ¶3(D); App. at 27.

When the legislature failed to pass enabling legislation for a "franchise system," the Department of Transportation embarked upon the process of implementing the I/M program through the certification of "private garages." Presumably, "private garages" would be induced to obtain certification by the prospect of charging motorists for performing inspections and for any necessary resulting repairs. Certification would be conducted in two stages. In Phase I, garages would be certified as having adequate space, lighting, and equipment. In Phase II, the garages would have to obtain approved emissions analyzing equipment and hire a certified emissions inspector.

In late 1979 the Commonwealth requested and obtained agreement from Delaware Valley and the EPA to modify the original consent decree so as to delay implementation of the I/M program until May 1, 1981. This modification was approved by the district court on March 7, 1980. App. at 54. On February 1, 1981, just three months before the I/M program was scheduled to be implemented under the then-existing consent decree, the Commonwealth had still not published final regulations covering the vehicle emissions analyzing equipment which private garages would have to procure in order to become certified inspection stations. On February 6, 1981 the Commonwealth requested Delaware Valley and the EPA to consent to another modification of the consent agreement so as to delay the start of the I/M program until January 1, 1983. The need for the 20-month delay was to permit the Commonwealth to require the use of "computerized analyzer" testing equipment. This type of equipment had been recommended by the EPA for decentralized inspection programs such as the Commonwealth's, since

it offered greater accuracy and would therefore enhance public confidence in I/M programs. However, this computerized equipment had not yet been produced by any manufacturer, not even in prototype.

This request for modfication was the subject of negotiations among the parties but the parties failed to reach agreement and negotiations came to an impasse on April 28, 1981. On April 29, 1981 the Commonwealth filed a motion with the district court for a modification of the existing consent decree which would delay the start-up of the I/M program from May 1, 1981 to January 1, 1983. On May 1, 1981, Delaware Valley filed a motion to have the court hold the Commonwealth in violation of the consent decree's requirement that the Commonwealth implement the I/M program by May 1, 1981.

Following a court conference on May 6, 1981, the EPA, at the court's request, submitted a brief report on the current air quality in the Philadelphia and Pittsburgh areas. The report demonstrated that, while air quality in the two regions was improving or presently adequate in respect to some EPA standards, it continued to be inadequate in respect to other EPA standards. For example, the ozone level in the Pittsburgh area not only failed to meet the standard, but had become worse over the preceding two years. In the Philadelphia area, the ozone level, while decreasing, was still at nearly twice the concentration permitted by the EPA standard. *Id.* at 377. After receiving the EPA report, the district court issued its order of May 20, 1981 denying the Commonwealth's request for a modification of the consent decree which would extend the I/M program implementation date for another 20 months. The court also found the Common-

wealth in violation of the existing decree in that the Commonwealth had not complied with the May 1, 1981 deadline for I/M program implementation as specified in the decree. *Id.* at 385.

The May 20 order also directed the Commonwealth to submit "a proposed plan for the Court's consideration, providing for the *immediate* implementation of the I/M program in accordance with the Consent Decree." *Id.* at 389. The Commonwealth submitted its proposed plan on June 1 and Delaware Valley submitted comments on the plan on June 8.

The court heard oral argument on June 10 with respect to the Commonwealth's proposed I/M plan. In an order dated June 16, 1981, the court approved the Commonwealth's I/M plan, along with certain amendments which had been suggested by Delaware Valley's comments. In the order the court extended the deadline for implementation of the I/M program from May 1, 1981 to May 1, 1982, because the latter date was the earliest date by which the Commonwealth could complete its regulatory process and provide for the production of a sufficient number of emission analyzers to implement the I/M program. The court also modified the consent decree to require monthly state audits of emissions inspections stations, establishment of two official "referee" stations to handle consumer complaints, and certification of at least 3,000 inspection stations by May 1, 1982. *Id.* at 533. A motion by the Commonwealth for reconsideration of the June 16 order was denied on July 14, 1981. *Id.* at 714.[5]

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[5] After the record in this case was closed, we were informed that the Pennsylvania legislature by statute had prohibited the expenditure of public funds for the establishment of the I/M

II.

The authority of the district court to modify or refuse to modify the consent decree is defined in the decree itself. Paragraph 13 of the decree empowers the court, upon application by any party, to enter "such further orders and directions as may be necessary or appropriate for carrying out" the decree, or to modify or terminate any of the decree's provisions "upon a showing of changed circumstances and good cause."[6] This provision of the decree is merely declaratory of a district court's inherent power to modify a consent decree, even over the objection of one of the parties. *Jordan v. School Dist.*, 548 F.2d 117 (3d Cir. 1977). As Justice Cardozo wrote in *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932):

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent.

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program and that implementation of the program had ceased. The district court had thereupon, on January 22, 1982, held the Commonwealth in civil contempt. Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pa., No. 76-2068 (E.D. Pa. Jan. 22, 1982). This aspect of the controversy is not before us.

[6] Paragrah 13 of the consent decree provides:

> Jurisdiction is retained by this Court for the purpose of enabling any party to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for carrying out of this Consent Decree, for the modification or termination of any of the provisions herein upon a showing of changed circumstances and good cause, or for the enforcement of compliance therewith and the punishment of violations thereof.

App. at 35.

> . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. . . . The result is all one whether the decree has been entered after litigation or by consent. . . . We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act. . . . [I]n truth what was then adjudged was not a contract as to any one. The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.

(Citations omitted.) *Accord, System Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 646-47 (1961); *Jordan, supra*, 548 F.2d at 120-22.[7]

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[7] In an analogous setting, Fed. R. Civ. P. 60(b) grants a district court discretionary authority to relieve a party from a judgment when "it is no longer equitable that the judgment should have prospective application." Rule 60(b)(5) or for "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6).

In attacking the district court's orders modifying and refusing to modify the consent decree, the Commonwealth presents two arguments. First, the Commonwealth argues that the district court's actions with respect to the decree were procedurally flawed because the court did not hold a full hearing on the parties' contentions and declined to hear testimony from various witnesses that the Commonwealth had produced. Second, the Commonwealth argues that the court's orders, substantively, were improper.

On the question of procedure, this court held in *Mayberry v. Maroney (I)*, 529 F.2d 332 (3d Cir. 1976), that a district court must hold an evidentiary hearing before modifying a consent decree in such a manner as to remove requirements previously imposed. As Judge Gibbons wrote in his concurrence in *Mayberry I*, "Rule 60 (b) (6) confers no standardless residual discretionary power to set aside judgments on mere second thought." *Id.* at 337 (Gibbons, J., concurring). To say that an evidentiary hearing must be held before a court decides to *modify* a consent decree does not, however, imply that such a hearing is required before a court *refuses* to modify a consent decree. A consent decree is, after all, a judgment and is entitled to a presumption of finality. *See Mayberry v. Maroney (II)*, 558 F.2d 1159, 1163 (3d Cir. 1977). *Cf. Ackermann v. United States*, 340 U.S. 193, 198 (1950). ("There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."). A court may thus be justified in rejecting, without affording an evidentiary hearing, a post-judgment attempt by a party to escape from obligations it had voluntarily assumed.

Neither is an evidentiary hearing required when a court modifies a consent decree in a substantive manner which is contemplated by the decree itself. Here, as discussed more fully below, the consent decree expressly provided for the possibility that the Commonwealth might have to conduct monthly audits of emissions inspection stations and might have to establish "referee" stations. In addition, the requirement that the Commonwealth make provision for some minimum number of stations to be certified, was necessarily implicit in the decree if the decree was to have any meaning or effect.

In this case, the Commonwealth's arguments were presented to the district court in various motion papers, at a conference held on May 6, 1981, and at a hearing on June 10, 1981. Given that, in its orders, the court did not increase the obligations to which the Commonwealth had already agreed when it signed the then-existing decree, we are satisfied that the court did not err in the manner in which it conducted the motion proceedings.

III.

With respect to the Commonwealth's challenges to the substance of the district court's orders at issue here, our scope of review is narrow. In reviewing the district court's orders, the issue is not whether the timetable or method of implementation sought by the Commonwealth was reasonable, or whether this court would have granted the Commonwealth's requests had the matter been initially before us. The issue, rather, is whether the district court properly exercised its discretion in deciding the matters presented to it.

A.

The District Court's Refusal to Extend the Compliance Deadline to January 1, 1983

In the context of motions for relief from judgments under Rule 60(b),[8] this court has observed that

> the standard for reopening a consent final judgment is a strict one. The Rule confers on district judges "[no] standardless residual discretionary power to set aside judgments. . . ." . . . Such relief is extraordinary and may be granted only upon a showing of exceptional circumstances. . . . We recognize, as well, that while consent decrees are judicial acts, they have often been recognized as having many of the attributes of a contract voluntarily undertaken. . . .And where, as here, the defendants made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment their burden under Rule 60(b) is perhaps even more formidable than had they litigated and lost.

Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1119-20 (3d Cir. 1979) (citations omitted), *cert. denied*, 444 U.S. 1026 (1980). The party seeking a modification of a consent decree

> must bear a heavy burden of showing circumstances so changed that "dangers, once substantial, have become attenuated to a shadow." *United States v.*

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[8] The standard for denial of a motion to modify a consent decree is the same as the standard for denial of a Rule 60(b) motion. International Bhd. of Teamsters, Local 249 v. Western Pa. Motor Carriers Ass'n, 660 F.2d 76, 85 n. 16 (3d Cir. 1981).

> *Swift & Co.*, 286 U.S. 106, 119 (1932), and that, absent such relief an "extreme" and "unexpected" hardship will result. *Id.* . . . [A] healthy respect for the finality of judgments demands no less.

Mayberry II, supra, 558 F.2d at 1163. *Accord, International Bhd. of Teamsters, Local 249 v. Western Pa. Motor Carriers Ass'n*, 660 F.2d 76, 85 (3d Cir. 1981); *United States Steel Corp. v. Fraternal Ass'n of Steel Haulers*, 601 F.2d 1269, 1274 (3d Cir. 1979).

The Commonwealth's April 29, 1981 motion to modify the consent decree was filed just two days before the I/M program had been scheduled to start under the then-existing decree. The sole reason advanced by the Commonwealth for seeking this modification was the Commonwealth's desire to specify computer analyzer emission testing equipment for its I/M program, instead of using the "BAR-80" analyzers then presently available.[9] In order to implement an I/M program with computer analyzers, the Commonwealth represented that an additional 20 months were needed because the desired computer analyzer testing equipment had not, as yet, been manufactured by any company, not even in prototype. The Commonwealth motion noted that an EPA policy statement of September 24, 1980 favored the use of computer analyzer testing equipment for decentralized I/M programs such as the program to be used in Pennsylvania.

As previously observed, the district court, at a conference of the parties held on May 6, 1981, considered

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[9] BAR-80 is the common designation for vehicle emission analyzers which meet the California Bureau of Automobile Repair 1980 specifications.

the Commonwealth's motions and requested an EPA report. After reviewing the report on May 20, the court denied the extension of time sought by the Commonwealth. The district court's opinion reveals that two factors underlay its decision not to grant the 20-month extension. First, as noted earlier, the EPA report had found that air quality in the Philadelphia and Pittsburgh areas continued to be substandard in some respects, and in one aspect had even gotten worse. At the time of the district court's order, the Commonwealth was already six years behind schedule in implementing the I/M program, and the court concluded that further delay would result in an undesirable postponement in attaining air quality standards. Although the Commonwealth argues that delaying implementation from May 1, 1982 (the date ultimately ordered by the Court) to January 1, 1983 would have only a small impact on air quality, its own calculations indicate that the district court's decision not to delay implementation further would result in a lowering of pollutant levels at an earlier date than would occur under the Commonwealth's proposal.[10]

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[10] Although the Commonwealth's calculations indicate that the ozone concentrations in the Philadelphia and Pittsburgh areas on January 1, 1984 would not differ significantly regardless of whether the I/M program were implemented on May 1, 1982 or January 1, 1983, these same calculations indicate that compliance with the national ozone standard as of January 1, 1983 would be advanced by an earlier I/M deadline. For example, under the "Rollback Model" used by the Commonwealth, ozone levels in the Pittsburgh area on January 1, 1983 would be only 3% above the national standard of .12 ppm (parts per million) if the I/M program were implemented on May 1, 1982, but would be 13% above the standard if implementation were delayed. (The figures generated by using the alternative "EKMA Model" would

Second, although the computerized analyzer favored by the Commonwealth might present certain advantages, the district court concluded that further delay of the I/M program was not warranted given that the existing analyzers were adequate, that the computerized analyzers were $1,000 to $2,000 more costly for private garages to purchase than the BAR-80 analyzers,[11] and—most important—that there was no assurance that on January 1, 1983 a sufficient number of computerized analyzers would be available. As the court noted:

> The new computer analyzer which is more expensive, is not now available and, though presumably more accurate than the less expensive available analyzer, the degree of accuracy is neither necessary nor required by the [EPA]. All parties, including the EPA, agree that existing analyzers, which are less expensive for the inspecting gas stations to buy, are adequate to fulfill the needs of the I/M program.

App. at 386.

The Commonwealth has never represented that the computer analyzers it wishes to specify will be available to meet a January 1, 1983 implementation deadline. Thus, the Commonwealth's motion to modify the decree would

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be 14% and 23%.) In the Philadelphia area, ozone levels would exceed the national standard by 13% if implementation occurred on May 1, 1982, but would exceed the standard by 19% if implementation were postponed by an additional eight months. (The corresponding figures under the EKMA Model would be 28% and 33%.) *See* Appellant's Brief at 24 (Table I).

[11] *See* App. at 110. During oral argument the Commonwealth estimated the cost of a BAR-80 analyzer at $6,000. Tr. of Oral Argument at 24.

have delayed the I/M program by 20 months without any assurance that the program could be instituted even at that time in the form proposed by the Commonwealth. In this light, although, as the United States argues in its brief, the extension of time sought by the Commonwealth was not unreasonable, we cannot say that the district court abused its discretion in denying the extension.

B.

The District Court's Declaration That the Commonwealth Had Violated the Consent Decree

The Commonwealth does not dispute the fact that on May 20, 1981, when the district court found it in violation of the consent decree, it had failed to meet the May 1, 1981 deadline that then existed for the implementation of the I/M program. As of May 1, 1981 no inspection stations had been certified; indeed, none could have been because the Commonwealth had not yet published final regulations for the emissions analyzer equipment such stations would be required to use.

Despite this clear evidence of noncompliance with the consent decree, the Commonwealth contends that the district court should not have held it in violation of the decree because the Commonwealth had "diligently worked to modify the Consent Decree" and Delaware Valley had refused to consent to the Commonwealth's proposed modifications. Appellants' Brief at 30. As Delaware Valley noted in its brief, "Reduced to its essence, the Commonwealth argues that a defendant should be relieved of its liability under a judgment whenever the plaintiff refuses to modify the judgment." Delaware Valley Brief at 23.

The Commonwealth's argument is clearly untenable. While we do not pass on whether the Commonwealth acted in good faith in its response to the consent decree, it is obvious that a party to a binding judgment cannot comply with its terms by ignoring strictures placed upon it in the hope that they will disappear. As we stated in *Mayberry I, supra,* "The consent decree became the judgment of the court and the state officials were no more free to disregard its terms than are other litigants." 529 F.2d at 336 (citation omitted).

Had the Commonwealth sought both to comply in good faith with the decree and to employ the computerized analyzers, a request for modification of the decree could have been filed long before April 29, 1981. The record reveals that the Commonwealth knew *seven months* before the implementation deadline of May 1, 1981 that the EPA was recommending computerized analyzers and that the utilization of such equipment would require a postponement of the then-established I/M program implementation date. Furthermore, all plaintiffs had placed the Commonwealth on notice early in February, 1981, that they would expect compliance with the decree unless further modifications were ordered. The plaintiffs were under no obligation to agree to the Commonwealth's proposed modification and the Commonwealth, for its part, was always entirely free to apply to the district court for a modification. It delayed doing so, however, until April 29, 1981, only two days before the implementation deadline imposed by the decree.

Although the district court stated that "the Commonwealth's delay in establishing the I/M program is disappointing and in large measure inexcusable," App. at 387,

the court at that time denied Delaware Valley's request to set objective criteria by which to measure the Commonwealth's compliance with the decree and to provide for stipulated penalties. Thus, far from abusing its discretion in declaring the Commonwealth in violation of the decree, even though it found the Commonweatlh to have violated its judgment the court adopted a deferential and restrained approach in declining to impose sanctions against the Commonwealth.

C.

Requirement of Monthly Audits and "Referee" Stations

In requiring monthly, rather than quarterly, audits of inspection stations, and the establishment of two official "referee" inspection stations instead of relying on consumer complaint investigations, the district court imposed requirements specifically provided for in the consent decree. Each of the requirements was meant as a fallback position in case less costly measures favored by the Commonwealth did not prove equally effective.

1.

With respect to audits of the private garages participating in the I/M program, the consent decree provided that the Commonwealth would develop

> quality control procedures . . . including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records. Periodic visits shall be unannounced and occur at least once every three (3) months for each inspection facility, unless the quality control pro-

> cedures are modified pursuant to paragraphs 4, 6 and 8 of this schedule.

Modified Consent Decree, Mar. 7, 1980, Sched. B, ¶1(D); App. at 56. Paragraphs 4 and 6 of the decree provided that the Commonwealth would "[c]ommence [a] study to determine . . . quality control procedures as effective as the results of monthly on-site visits by the Commonwealth to inspect facilities, check instrument calibrations and inspect records." ¶4; App. at 58, and to "[s]ubmit [the] study of quality control procedures, including recommendations and supporting data, to plaintiffs for review and comment." ¶6; App. at 59. In paragraph 8, the plaintiffs "reserve[d] the right to challenge any such procedures which are not as effective as the results of monthly on-site visits by the Commonwealth." App. at 59.

On September 23, 1980, the EPA issued a memorandum in which it rejected the Commonwealth's proposal to audit inspection stations on a quarterly basis. The EPA concluded:

> Until [the Pennsylvania Department of Transportation] submits adequate information which shows that they have devised some other quality assurance program which is as effective as monthly audits, we feel that [the Department] must implement a system of monthly audits at all inspection stations.

In light of the EPA memorandum, Delaware Valley did challenge the Commonwealth's proposal for quarterly audits, pursuant to Schedule P, paragraph 8 of the consent decree, when Delaware Valley submitted its comments on the Commonwealth's June 1, 1981 proposal for implementation of the I/M program. *Id.* at 469.

The district court, noting that the EPA report had "outlined numerous deficiencies and inadequacies of the proposed surveillance system" and that "EPA strongly recommended that the Commonwealth adopt a system of monthly audits, which in the opinion of the EPA would still remain cost-effective," concluded that "the proposed quarterly visitation program would not be 'as effective as the results of monthly visits.'" *Id.* at 536. The court thus required the Commonwealth to institute monthly audits of the private garages participating in the I/M program. In view of Schedule B, paragraph 8 of the decree, which left open the possibility that monthly audits would be required if the Commonwealth's alternative procedures were "not as effective as the results of monthly on-site visits," and the EPA report indicating the deficiencies of the Commonwealth's proposal, the district court's action was not an abuse of discretion.

2.

With respect to the establishment of "referee" stations,[12] Schedule B, paragraph 9 of the consent decree required the Commonwealth to adopt

> policies for providing, as a consumer protection mechanism, facilities where official confirming inspections may be conducted independent of certified private garages (i.e., at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of other facilities at

[12] The purpose of "referee" stations was to provide a neutral state-run testing facility in the event a dispute arose with the private garage as to the inspection results.

> the sole discretion of [the Pennsylvania Department of Transportation], or an equally effective alternative, such as timely consumer compl[ai]nt investigations by Commonwealth employees. These employees would return to the inspection station in question with the complainant to verify the inspection procedures, to verify the calibration of the analyzer and to supervise the retest of the vehicle in question.

Id. at 60. After considering Delaware Valley's objection that the Commonwealth consumer complaint proposal would be inadequate, the district court concluded:

> [C]ommon sense dictates that the Commonwealth's proposed Central Complaint Office procedure would not rise to the level of "an equally effective alternative" as that of at least one official confirming inspection station in both the Philadelphia and Pittsburgh areas, as described in Sch. B, ¶9 of the modified Consent Decree.

Id. at 537.

As the district court observed in its opinion, the establishment of "referee" stations was "the originally envisioned mode" of ensuring the accuracy of the inspections performed by the private garages. *Id.* at 538. Alternative procedures were permissible only if they were "equally effective." The district court concluded that the alternative proposed by the Commonwealth would not be equally as effective as the establishment of "referee" stations. We hold that the court did not abuse its discretion in thereby requiring that "referee" stations be established.

D.

Certification of 3,000 Stations

The district court in its June 16, 1981 order, required the Commonwealth to certify at least 3,000 inspection stations by May 1, 1982. The Commonwealth argues that this was an abuse of discretion because there was no such requirement in the consent decree and because the Commonwealth had no way of ensuring compliance with the requirement since it has no power or authority to mandate that private garages purchase the emissions analyzers and hire the inspectors necessary to obtain Phase II certification.

At oral argument, the Commonwealth indicated that its objection was not to the *number* of stations mandated —indeed, the Commonwealth itself had contemplated the establishment of 8,700 stations, nearly three times the number required by the district court[13]—but to the fact that the court required the certification of *any* stations. The Commonwealth's position was that it would have been an abuse of discretion for the court to have mandated the certification of even *one station*. Tr. of Oral Argument at 8. In the Commonwealth's view, the consent decree did not require it to establish a network of inspection stations, but merely to set up a system which private stations could volunteer to join. *Id.* at 14. And if too few or even no stations, chose to participate, then—in an argument reminiscent of its earlier apology for noncompliance with the May 1, 1981 implementation deadline—the Commonwealth would treat the decree as inoperative and seek to modify it. *Id.* at 13, 18-19, 21-22, 43.

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[13] *See* App. at 559.

We reject this argument in its entirety. The Commonwealth in effect is asserting that the consent decree into which it entered imposed *no* real obligation on it to ensure that vehicle inspections took place and that pollutant emissions were reduced.[14] We agree with Dela-

[14] As the Commonwealth stated at oral argument:

MR. HRUBOVCAK: . . . [N]o stations have been certified through Phase 2 or purchased the required piece of equipment.

THE COURT: Well, now, let's assume that none ever do and you come back to Judge Bechtle and ask for a modification of the decree.

What will the Commonwealth's position be? Will it be that the decree finds them to do something about the problem or that, well, this settlement failed; let's try the lawsuit?

MR. HRUBOVCAK: Well, Your Honor, I really can't speculate as—

THE COURT: I have to speculate.

MR. HRUBOVCAK: Okay. The basis for your speculation is that no stations have applied for a Phase 2 certification, and, therefore, no cars can be inspected at the required date; is that the ground rules, Your Honor?

THE COURT: Yes. What happens then? Does the decree bind the Commonwealth to do anything at all?

MR. HRUBOVCAK: No, Your Honor. *The decree, as I read it, would not bind the Commonwealth at all.* That might be—

THE COURT: That leaves the case in the posture then that the plaintiffs would say, "All right. If the Commonwealth isn't bound, let's go back and try the lawsuit."

MR. HRUBOVCAK: That will be one possibility.

THE COURT: Yes.

MR. HRUBOVCAK: Your Honor—

THE COURT: And that is not a very attractive construction of a final judgment that's been in place for a number of years.

Tr. of Oral Argument at 21-22 (emphasis added).

ware Valley that "[s]uch an argument would make a mockery of the Consent Decree and would work a cruel hoax on the court." Delaware Valley Brief at 31.

Although the requirement that a certain number of inspection stations be certified is not explicitly set forth in the decree, it is necessarily implicit in it. To hold otherwise would turn the decree into an empty promise. When it signed the decree, the Commonwealth must have known that the attainment of the decree's objectives would require a certain minimum number of inspection stations to be established, and that it was the Commonwealth's duty under the decree to see that this was done. *See Mayberry I, supra,* 529 F.2d at 337 (Gibbons, J., concurring). We are unwilling to believe that the Commonwealth negotiated and signed the decree regarding it from the start as a meaningless document, a farce.

It is true that the Commonwealth cannot force privately-owned garages to articipate in the I/M program, but this argument is basically a distraction. It was always contemplated that the I/M program would be structured such that there would be an economic incentive for private garages to participate. In fact, at the time of the court's order, some 2,274 garages had already applied for the program and had achieved Phase I certification. App. at 535.

We have no reason to believe that if the Commonwealth set about implementing the I/M program in good faith, the goal of 3,000 certified stations could not be met. But even if the number of initially volunteering garages fell short of the number necessary to operate the I/M program adequately, this would not be grounds—as the Commonwealth seems to suggest—for scrapping the decree. The Commonwealth always retains the option to estab-

lish its own inspection stations if a shortage of inspection facilities develops. We thus hold that the district court did not abuse its discretion in requiring the Commonwealth to certify 3,000 inspection stations by May 1, 1982.

IV.

In short, the Commonwealth agreed to establish an I/M program and obligated itself to achieve particular goals by particular dates. We are not persuaded that its commitment, judicially decreed since August 29, 1978, was illusory. Accordingly, since we have concluded that the district court properly exercised its discretion, the orders appealed from will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2303

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, *et al.;* AMERICAN LUNG ASSOCIATION OF PHILADELPHIA AND MONTGOMERY COUNTY; DELCHESTER LUNG ASSOCIATION; SIERRA CLUB, PENNSYLVANIA CHAPTER; FRIENDS OF THE EARTH OF THE DELAWARE VALLEY; CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL; QUINN, KEVIN; FARRELL, KAYSI; WEISS, RUTH G.; KLINKNER, JOHN; BIEZ, ELIZABETH S.; SHULMAN, MONA

v.

COMMONWEALTH OF PENNSYLVANIA; TRAIN, RUSSELL E., Individually and as Administrator of the Environmental Protection Agency, *et al.;* SHERLOCK, WILLIAM T., Individually and as Secretary of the Pennsylvania Department of Transportation; GODDARD, MAURICE K., Individually and as Secretary of the Pennsylvania Department of Environmental Resources; SNYDER, DANIEL J., III, Individually and as Regional Administrator of the Environmental Protection Agency; Region III

(D. C. Civil No. 76-2068)

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA; the PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, Secretary of the Pennsylvania Department of Transportation; the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, Secretary of the Pennsylvania Department of Environmental Resources

(D. C. Civil No. 77-0619)

Commonwealth of Pennsylvania, *et al.*,

Appellants

Present: Aldisert, Gibbons, Hunter, Weis, Garth, Sloviter and Becker, *Circuit Judges*

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellants, Commonwealth of Pennsylvania, et al. in the above entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges or the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

(s) Garth

Judge

Dated: March 26, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068 and No. 77-619

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.,

Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA et al.,

Defendants

UNITED STATES OF AMERICA,

Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

CONSENT DECREE

WHEREAS, the United States Environmental Protection Agency (hereinafter "EPA") promulgated a transportation control plan for the Metropolitan Philadelphia and Southwest Pennsylvania Air Quality Control Regions on November 28, 1973 for the purpose of attaining the primary health-related ambient air quality standards for photochemical oxidants and carbon monoxide in the two regions;

WHEREAS, said transportation control plan included the requirement that the Commonwealth of Pennsylvania establish a mandatory inspection/maintenance program for light-duty and medium-duty vehicles in the two regions, 40 CFR Section 52.2038;

WHEREAS, Plaintiff Delaware Valley Citizens' Council for Clean Air, and other Plaintiffs, both organizational and individual, instituted Civil Action No. 76-2068 against the Commonwealth of Pennsylvania, the Secretary of the Pennsylvania Department of Transportation (hereinafter "PennDOT") the Secretary of the Pennsylvania Department of Environmental Resources (hereinafter "PennDER"), the Administrator and Regional Administrator of EPA to enforce the inspection/maintenance regulation, under the authority of the Clean Air Act, as amended, 42 U.S.C. 7401, *et seq.*, on June 29, 1976;

WHEREAS, EPA issued Notices of Violation to the Governor of Pennsylvania and the Secretary of PennDOT on September 23, 1976, under the authority of Section 113(a)(1) of the Clean Air Act, as amended 42 U.S.C. 7413(a)(1), for their failure to implement the inspection/maintenance regulation;

WHEREAS, Plaintiff United States instituted Civil Action No. 77-619 against the Commonwealth of Pennsylvania and certain of its departments and officers on February 18, 1977 under the authority of Section 113(b) of the Clean Air Act, as amended, 42 U.S.C. 7413(b);

WHEREAS, pursuant to a Stipulation entered into by the Plaintiffs in Civil Action No. 76-2068 and EPA on February 16, 1977, EPA was dismissed as a Defendant in that action upon the filing of Civil Action No. 77-619;

WHEREAS, extensive pre-trial motions and discovery proceedings have taken place in these actions, including oral argument of summary judgment motions by all parties on July 21, 1977, several sets of written interrogatories, and oral depositions of 14 employees of the Commonwealth of Pennsylvania;

WHEREAS, the parties agree that the entry of this Consent Decree is the most beneficial means to resolve this litigation;

WHEREAS, this Consent Decree is entered without the adjudication of any issues of fact or law.

NOW THEREFORE, before the taking of any testimony upon the pleadings and upon the consent of the parties by their respective attorneys and authorized officials, it is hereby ORDERED, ADJUDGED, and DECREED:

1. This Court has jurisdiction of the subject matter of these actions and of the parties hereto.

2. The provisions of this Consent Decree apply to the Defendants Commonwealth of Pennsylvania, Secretary of PennDOT and the Secretary of PennDER, to all Plaintiffs and to each of the officers, agents, employees and successors of said parties.

3. The following definitions apply to this Consent Decree:

A. Inspection—the testing of the exhaust emissions of a vehicle by means of the insertion of a probe of an emission analyzer or similar instrument into the tailpipe of the vehicle while its engine is operating.

B. Maintenance—the repair or adjustment of a vehicle in order to reduce the level of its exhaust emissions below exhaust emission standards prescribed by the Commonwealth.

C. Inspection/maintenance program—a program to reduce subject vehicle exhaust emissions by annually identifying vehicles that require maintenance and requiring that such maintenance be performed.

D. Private garage system—an inspection/maintenance program in which the Commonwealth certifies a number of privately-owned facilities to perform the inspection of vehicles.

E. Franchise system—an inspection/maintenance program in which the Commonwealth enters into a contract with a single person or entity to establish and operate the inspection aspects of the program for a geographic area or areas under the general administration of the Commonwealth and whereby the Commonwealth may also certify fleet operators, and motor vehicle dealers, who own, lease or operate at least 15 subject vehicles, to conduct inspections of subject vehicles owned, leased or operated by them

F. Philadelphia Area—Philadelphia, Bucks, Montgomery, Chester and Delaware Counties.

G. Pittsburgh Area—Allegheny, Beaver, Butler, Westmoreland and Washington Counties.

H. Light-duty motor vehicle—a gasoline powered 4-wheel motor vehicle rated at 7,000 pounds gross vehicle weight (GVW) or less which is commonly used on public roads or highways.

I. Medium-duty motor vehicle—a gasoline powered motor vehicle rated at more than 7,000 pounds GVW and no more than 11,000 pounds GVW which is commonly used on public roads or highways.

J. Subject Vehicle—each light-duty or medium-duty motor vehicle registered in the Philadelphia or Pittsburgh area except an antique or classic vehicle as presently defined in the Pennsylvania Vehicle Code, or any other vehicle that the Commonwealth determines is rarely used on the public roads or highways.

K. Inspector—a person authorized by the Commonwealth to perform inspections on subject vehicles.

L. Inspection facility—a place of business authorized by the Commonwealth to perform inspections on subject vehicles.

M. Exhaust emission standard—the level of exhaust emissions, prescribed by the Commonwealth, which separates subject vehicles requiring maintenance from those that do not.

N. Stringency Factor—a measure of the rigor of an inspection/maintenance program based on the estimated percentage of all subject vehicles whose exhaust emissions would exceed the exhaust emission standards for carbon monoxide and/or hydrocarbons prior to the performance of maintenance.

O. Single Sticker System—a system in which one inspection sticker is issued which does not, in any way, distinguish between compliance with the inspection/maintenance program and the inspection program presently in operation in the Commonwealth.

P. Double Sticker System—any system in which the inspection program sticker or stickers issued distinguish between compliance with the inspection/maintenance program and the inspection program presently in operation in the Commonwealth.

4. Because the Commonwealth seeks to secure the enactment by the Pennsylvania General Assembly of enabling legislation for a franchise system, PennDOT shall have until July 1, 1979 to use its best efforts to obtain such legislation. Defendant PennDOT shall further perform those other activities related to the establishment of an inspection/maintenance program which are listed in paragraphs 1 through 3 of the attached Schedule A and paragraph 1 of the attached Schedule B, which are annexed hereto and incorporated by reference into this Consent Decree, by the dates provided therein. If such legislation is not enacted by July 1, 1979, Defendant PennDOT shall immediately proceed toward implementation of a private garage system in accordance with paragraphs 2 through 8 of Schedule B pursuant to, inter alia, 75 P.S. §4701 et seq. However, on or before July 1, 1979, the parties may agree to extend this date to a date no later than October 1, 1979. If such an extension is granted and franchise legislation is not enacted within the extended time period, the dates specified in paragraphs 2 through 6 of Schedule B shall be extended by the same time period as such extension, and the dates specified in paragraphs 7 and 8 of Schedule B will be extended by three months.

5. If enabling legislation for a franchise system is enacted within the time period (or any extension thereof) specified in paragraph 4 above, Defendant PennDOT shall

immediately proceed toward implementation of a franchise system in accordance with the schedule set forth in paragraphs 4 through 10 of Schedule A. If such legislation is enacted, Defendant PennDOT shall not be required to comply with any portion of Schedule B (except as provided in paragraph 4 above).

6. The Executive Branch of the government of the Commonwealth of Pennsylvania shall not reduce below an operating level the funds for the inspection/maintenance program because of any reductions in funds appropriated to PennDOT.

7. Defendants shall establish exhaust emission standards for the inspection/maintenance program which shall result in at least a twenty-five per cent (25%) reduction in both hydrocarbon and carbon monoxide exhaust emissions by December 31, 1987, compared to the level of exhaust emissions that would exist on that date without the program; provided, that in no case will a stringency factor greater than twenty-five per cent (25%) be required if the inspection/maintenance program is implemented in accordance with the time periods specified in this Consent Decree. Should Defendants fail to establish the mandatory inspection/mandatory maintenance phase of the program on the dates specified in the applicable attached compliance schedule, Plaintiffs may seek modification of such stringency factor in order to achieve the above-referenced twenty-five per cent (25%) exhaust emissions reduction. In the event that the carbon monoxide or the photochemical oxidant primary ambient air quality standard is attained in the Philadelphia or the Pittsburgh area, the required reduction in the related exhaust emissions may be reduced in such area to a level which will at a minimum maintain such standard.

8. Defendant Commonwealth of Pennsylvania will pay, within thirty days of the entry of this Decree, reasonable counsel fees and costs to Plaintiffs' counsel in Civil Action No. 76-2068, the Public Interest Law Center of Philadelphia, in the amount of $30,000.00, which is a full, final and complete settlement of all counsel fees, costs and any other expenses.

9. The United States and the Public Interest Law Center of Philadelphia, counsel for Plaintiffs in Civil Action No. 76-2068, will reach final agreement on the attorneys' fees question within two weeks of the entry of this decree.

10. In order to defray a portion of the start-up costs of the inspection/maintenance program, EPA hereby agrees to award a grant of $400,000.00 to PennDOT. PennDOT agrees that it shall submit no later than ninety days prior to the date upon which expenditures of funds are to be made, a full and complete grant statement (on a form to be supplied by EPA) which shall include, but not be limited to, a work plan, budget, and a statement of federal and non-federal funds to be used for the project. EPA's review of said grant statement shall be limited to insuring its completeness, insuring that moneys listed are to solely be used for inspection/maintenance start-up costs, and insuring that the payment and expenditures of funds will be made in accordance with all applicable Federal laws and regulations. The parties agree that payment shall be made in accordance with a payment schedule which shall be included in the grant award document. Nothing contained herein shall preclude the Commonwealth from requesting or being considered for additional funding for inspection/maintenance efforts; pro-

vided, however, that compliance with the terms of this Consent Decree shall not be conditioned upon the award of any such future funding.

11. For the purpose of insuring compliance with this Consent Decree, PennDOT shall submit reports to the parties listed in paragraph 14 describing all actions (including the status of franchise legislation) taken toward compliance with this Decree, beginning with a report postmarked no later than January 1, 1979 and continuing every three months thereafter until the commencement of mandatory inspection and voluntary maintenance, and a report every six months thereafter until the end of the first year of mandatory inspection and mandatory maintenance. Commencing with a report postmarked no later than ninety days following completion of the first year of mandatory inspection and mandatory maintenance and continuing every year thereafter, Defendant PennDOT shall submit reports for the previous year which include at least the following:

(a) The number of subject vehicles inspected in the inspection/maintenance program;

(b) The number of such subject vehicles whose exhaust emissions initially exceeded the exhaust emission standards for carbon monoxide and/or hydrocarbons, in total and by pollutant;

(c) The number of inspection stickers issued to subject vehicles and the number of subject vehicles registered.

12. The Commonwealth shall be allowed to institute a waiver of maintenance program, based on the establishment of maximum maintenance costs for certain

subject vehicles, pursuant to regulations to be enacted by the Commonwealth. The Commonwealth shall make available to Plaintiffs evidence demonstrating the effect of such program. However, Plaintiffs will have the right to challenge any unreasonable waiver provision.

13. Jurisdiction is retained by this Court for the purpose of enabling any party to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for carrying out of this Consent Decree, for the modification or termination of any of the provisions herein upon a showing of changed circumstances and good cause, or for the enforcement of compliance therewith and the punishment of violations thereof.

14. All reports and other information that must be submitted to Plaintiffs in satisfaction of a requirement of this Consent Decree shall be sent to:

United States Environmental Protection Agency
Region III
6th and Walnut Streets
Philadelphia, Pennsylvania 19106

Attention: Director, Enforcement Division (3EN00)
United States Environmental Protection Agency
401 M. Street, S.W.
Washington, D.C. 20460

Attention: Director, Mobile Source Enforcement Division (EN-340)
United States Department of Justice
Land and National Resources Division
Washington, D.C. 20530

Attention: Chief, Pollution Control Section
Albert Slap, Esquire
Public Interest Law Center
1315 Walnut Street, 16th Floor
Philadelphia, Pennsylvania 19107

(Signatures appear on next page)

We hereby agree to the entry of the foregoing Consent Decree.

(s) Sanford Sagalkin
Sanford Sagalkin
Acting Assistant Attorney
General, Land and Natural
Resources Division

(s) Peter F. Vaira
Peter F. Vaira
United States Attorney
Philadelphia, Pennsylvania

(s) Thomas A. Pursley, III
Thomas A. Pursley, III
Attorney for United States
Department of Justice

(s) Robert S. Forster, Jr.
Robert S. Forster, Jr.
Assistant United States
Attorney, Philadelphia,
Pennsylvania

(s) Jack J. Schramm
Jack J. Schramm
Regional Administrator
United States Environmental
Protection Agency, Region III

(s) Albert J. Slap
Albert J. Slap
Public Interest Law Center
of Philadelphia, Counsel for
Plaintiffs in C.A. 76-2068

(s) John Hrubovcak
John Hrubovcak, Counsel for
Pennsylvania Department of
Transportation

(s) Keith Welks
Keith Welks, Counsel for
Pennsylvania, Department of
Environmental Resources

(s) B. R. Jackson
Benjamin R. Jackson
Acting Deputy Assistant
Administrator for Mobile Source
and Noise Enforcement, United
States Environmental Protection
Agency

So Ordered this 29th day of August, 1978.

(s) Louis C. Bechtle
Louis C. Bechtle, *J.*

SCHEDULE A

To the extent Schedule A is applicable by the terms of this Consent Decree, Defendant PennDOT shall implement the following schedule for a franchise inspection/maintenance program:

1. *September 15, 1978.* Submit to Plaintiffs a current copy of the legislation which Defendants intend to introduce in the Pennsylvania General Assembly.

2. *October 1, 1978.*

(A) Introduce legislation in the Pennsylvania General Assembly and submit a copy of such legislation to Plaintiffs.

(B) Commence development work on a Request for Proposals to establish an inspection/maintenance program in the Philadelphia and Pittsburgh areas.

(C) Commence development of standards, procedures, and regulations for the inspection/maintenance program, including:

(1) The hydrocarbon and carbon monoxide exhaust emission standards to be applied to each subject vehicle, such standards to be consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

(2) The requirement that, commencing twenty-one months after enactment of legislation, all subject vehicles be inspected once each year (but need not be maintained during the initial year) and in addition, commencing thirty-three months after enactment of legislation, that all subject vehicles whose emissions fail to meet the hydrocarbon and/or carbon monoxide emission standards, established according to paragraph 2 (C) (1) of this schedule, be maintained and reinspected. If a single sticker system or a denial of registration enforcement mechanism is used by the Commonwealth, such maintenance and re-

inspection shall be required prior to the expiration of the inspection period in which the subject vehicle is initially inspected, such inspection period to be no longer than three months. If a double sticker system is used by the Commonwealth, such maintenance and re-inspection shall be required within three weeks of failure.

(3) Enforcement procedures applicable to owners of subject vehicles effective no later than twenty-one months after enactment of legislation, including at a minimum: (a) denial of registration by the Commonwealth to any subject vehicle which does not meet the requirements of paragraph 2(C)(2) of this schedule or an equally effective enforcement mechanism, such as the denial of a valid sticker signifying compliance with the inspection/maintenance program; (b) the prohibition of operation on the public roads of any vehicle which does not meet the requirements of paragraph 2(C)(2) of this schedule, with adequate enforcement thereof and monetary sanctions for operation of such vehicles at least equal in amount to those assessed against the owners of vehicles in violation of the inspection program presently in operation in the Commonwealth.

(4) If the Commonwealth authorizes inspections by fleet operators and motor vehicle dealers, the following shall also be developed:

(A) A description of quality control procedures to be utilized by the Commonwealth, including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records.

(B) The requirements for the certification of such fleet operators and motor vehicle dealers as inspection facilities which shall at a minimum require that:

(1) the facility has emission analyzer equipment authorized under Commonwealth regulations,

(2) the facility employs at least one person who has received training in the proper use of such equipment and in inspection procedures, and who has demonstrated proficiency in such usage and procedures,

(3) the facility agrees to maintain, and periodically submit to the Commonwealth, records adequately describing: all vehicles inspected, the exhaust emission levels measured at each inspection and reinspection of such vehicles, and the calibration of testing equipment.

(C) Minimum requirements for exhaust emission analyzer equipment, the calibration of such equipment, and testing procedures.

3. *July 1, 1979.* Submit to Plaintiffs a draft copy of the Request for Proposals.

4. *Two months after the enactment of legislation.* Issue to potential contractors the Request for Proposals and submit this document to Plaintiffs.

5. *Five months after the enactment of legislation.* Submit to Plaintiffs a copy of the proposal selected by the Commonwealth for implementation of the inspection/maintenance program.

6. *Six months after the enactment of legislation.*

(A) Submit to Plaintiffs a copy of the signed contract between the Commonwealth and the contractor. This contract shall, among other things, require the contractor to make the inspection records available to the Commonwealth, require the contractor to perform instrument calibration checks and allow the Commonwealth to inspect the premises of the contractor.

(B) Propose inspection/maintenance regulations by publication in the Pennsylvania Bulletin, and submit to Plaintiffs those regulations and other standards and procedures, for the inspection/maintenance program which, at a minimum, include the provisions listed in paragraph 2(C) of this schedule. Defendants shall also submit to Plaintiffs documentation that the proposed exhaust emission standards are consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

7. *Eight months after enactment of legislation.* Adopt, and submit to Plaintiffs, final standards, procedures, and regulations for the inspection/maintenance program, which, at a minimum, include the provisions listed in paragraph 2(C) of this schedule.

8. *Fifteen months after enactment of legislation.*

(A) Commence a program to train automobile repair mechanics in the requirements of the inspection/maintenance program and the proper means of maintaining and repairing vehicles to meet such program requirements.

(B) Commence a program to inform the public and the automotive repair industry of the inspection/maintenance program.

9. *Twenty-one months after enactment of legislation.* Commence mandatory annual inspection and voluntary maintenance of all subject vehicles, all such vehicles to be inspected at least once by the end of the 32nd month after the enactment of legislation.

10. *Thirty-three months after enactment of legislaton.* Commence the period of mandatory annual inspection of all subject vehicles and mandatory maintenance and re-inspection of all such vehicles which fail to meet the exhaust emission standards of the inspection/maintenance program. If a single sticker system or a denial of registration enforcement mechanism is used by the Commonwealth, such maintenance and re-inspection shall be required prior to the expiration of the inspection period in which the subject vehicle is initially inspected, such inspection period to be no longer than three months. If a double sticker system is used by the Commonwealth, such maintenance and re-inspection shall be required within three weeks of failure.

SCHEDULE B

To the exent Schedule B is applicable by the terms of this Consent Decree, Defendant PennDOT shall implement the following schedule for a private garage inspection/maintenance program:

1. *October 1, 1978.* Commence development of standards, procedures, and regulations for the inspection/maintenance program, including at a minimum:

(A) The hydrocarbon and carbon monoxide exhaust emission standards to be applied to each subject ve-

hicle, such standards to be consistent with the emissions reductions specified in paragraph 7 of this Consent Decree.

(B) The requirement that commencing August 1, 1980, all subject vehicles be inspected once by January 31, 1981; and in addition, that commencing February 1, 1981, all subject vehicles be inspected once each year and that all subject vehicles whose emissions fail to meet the hydrocarbon and/or carbon monoxide emission standards, established according to paragraph 1 (A) of this schedule be maintained and re-inspected prior to the expiration of the inspection period in which the subject vehicle is inspected, such inspection period to be no longer than three months.

(C) Enforcement procedures applicable to owners of subject vehicles, effective no later than August 1, 1980, including: (1) the denial of a valid sticker signifying compliance with the inspection/maintenance program to any subject vehicle which does not meet the requirements of paragraph 1 (B) of this schedule; (2) the prohibition of operation on the public roads of any vehicle which does not meet the requirements of paragraph 1 (B) of this schedule, with adequate enforcement thereof and monetary sanctions for operation of such vehicles at least equal in amount to those assessed against the owners of vehicles in violation of the inspection program presently in operation in the Commonwealth.

(D) A description of quality control procedures to be utilized by the Commonwealth, including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records.

(E) The requirements for the certification of private garages as inspection facilities which shall at a minimum require that:

(1) the facility has emission analyzer equipment authorized under Commonwealth regulations,

(2) the facility employs at least one person who has received training in the proper use of such equipment and in inspection procedures, and who has demonstrated proficiency in such usage and procedures,

(3) the facility agrees to maintain, and periodically submit to the Commonwealth, records, adequately describing: all vehicles inspected, the exhaust emission levels measured at each inspection and reinspection of such vehicles, and the calibration of testing equipment.

(F) Minimum requirements for exhaust emission analyzer equipment, the calibration of such equipment, and testing procedures.

2. *July 1, 1979.* Propose inspection/maintenance regulations by publication in the Pennsylvania Bulletin, and submit to Plaintiffs, those regulations and other standards and procedures, for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule. Defendants shall also submit to Plaintiffs documentation that the proposed exhaust emission standards are consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

3. *September 1, 1979.*

A. Adopt, and submit to Plaintiffs, standards, procedures, and regulations for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule.

(B) Commence notification to potential inspection facilities, inspectors, and inspector training facilities concerning the inspection/maintenance program, and submit a copy of such notification to Plaintiffs.

4. *November 1, 1979.*

(A) Commence the certification of inspection facilities which meet the requirements of the adopted standards, procedures, and regulations of the inspection/maintenance program.

(B) Commence a program to train inspectors in the requirements of the inspection/maintenance program, the proper use of exhaust emission analyzer equipment, and inspection procedures, and to certify their proficiency and knowledge therein.

5. *February 1, 1980.* Commence a program to inform the public of the inspection/maintenance program.

6. *July 1, 1980.* Submit to Plaintiffs adopted policies for providing, as a consumer protection mechanism, facilities where official confirming inspections may be conducted independent of certified private garages (i.e., at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of other facilities at the sole discretion of PennDOT), or an equally effective alternative, such as timely consumer complaint investigations by Commonwealth employees. These

employees would return to the inspection station in question with the complainant to verify the inspection procedures, to verify the calibration of the analyzer and to supervise the retest of the vehicle in question. These policies would be effective by February 1, 1981. Defendant PennDOT will maintain and make available to Plaintiffs such records as are adequate to demonstrate the effectiveness of this mechanism.

7. *August 1, 1980.* Commence the period of mandatory annual inspection and voluntary maintenance of all subject vehicles, all such vehicles to be inspected once by January 31, 1981, and commence a program to train mechanics in the proper means of repairing vehicles to meet the requirements of the inspection/maintenance program.

8. *February 1, 1981.* Commence the periods of mandatory annual inspection of all subject vehicles and mandatory maintenance and re-inspection of all such vehicles which fail to meet the exhaust emission standards of the inspection/maintenance program prior to the expiration of the inspection period in which the subject vehicle is inspected, such inspection period to be no longer than three months.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions No. 76-2068 and No. 77-619

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.,

Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

UNITED STATES OF AMERICA,

Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

MODIFICATION OF CONSENT DECREE

WHEREAS, a Consent Decree was entered on August 30, 1978, as the most beneficial means to resolve this litigation; and

WHEREAS, all parties agree that modifications are necessary to the Consent Decree in order to assure timely implementation of an effective inspection/maintenance program in affected areas of the Commonwealth.

NOW THEREFORE, upon the consent of the parties by their respective attorneys and authorized officials, it is hereby ORDERED, ADJUDGED, and DECREED that the August 30, 1978 Consent Decree shall be modified as follows:

"SHEDULE B

To the extent Schedule B is applicable by the terms of this Consent Decree, Defendant PennDot shall implement the following schedule for a private garage inspection/ maintenance program:

1. *October 1, 1978.* Commence development of standards, procedures, and regulations for the inspection/ maintenance program, including at a minimum:

(A) The hydrocarbon and carbon monoxide exhaust emission standards to be applied to each subject vehicle, such standards to be consistent with the emissions reductions specified in paragraph 7 of this Consent Decree.

(B) The requirement that commencing August 1, 1980, all subject vehicles be inspected once by January 31, 1981; and in addition, that commencing February 1, 1981, all subject vehicles be inspected once each year and that all subject vehicles whose emissions fail to meet the hydrocarbon and/or carbon monoxide emission standards, established according to paragraph 1 (A) of this schedule be maintained and re-inspected prior to the expiration of the inspection period to be no longer than three months.

(C) Enforcement procedures applicable to owners of subject vehicles, effective no later than August 1, 1980, including: (1) the denial of a valid sticker signifying compliance with the inspection/maintenance program to any subject vehicle which does not meet the requirements of

paragraph 1 (B) of this schedule; (2) the prohibition of operation on the public roads of any vehicle which does not meet the requirements of paragraph 1 (B) of this schedule, with adequate enforcement thereof and monetary sanctions for operation of such vehicles at least equal in amount to those assessed against the owners of vehicles in violation of the inspection program presently in operation in the Commonwealth.

(D) A description of quality control procedures to be utilized by the Commonwealth, including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records. Periodic visits shall be unannounced and occur at least once every three (3) months for each inspection facility, unless the quality control procedures are modified pursuant to paragraphs 4, 6 and 8 of this schedule.

(E) The requirements for the certification of private garages as inspection facilities which shall at a minimum require that:

(1) the facility has emission analyzer equipment authorized under Commonwealth regulations,

(2) the facility employs at least one person who has received training in the proper use of such equipment and in inspection procedures, and who has demonstrated proficiency in such usage and procedures,

(3) the facility agrees to maintain, and periodically submit to the Commonwealth, records adequately describing: all vehicles inspected, the exhaust emission levels measured at each inspection and re-inspection of such vehicles, and the calibration of testing equipment.

(F) Minimum requirements for exhaust emission analyzer equipment, the calibration of such equipment, and testing procedures.

2. *July 1, 1979.* Propose inspection/maintenance regulations by publication in the Pennsylvania Bulletin, and submit to Plaintiffs, those regulations and other standards and procedures, for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule. Defendants shall also submit to Plaintiffs documentation that the proposed exhaust emission standards are consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

3. *September 1, 1979.*

(A) Adopt, and submit to Plaintiffs, standards, procedures and regulations for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule.

(B) Commence notification to potential inspection facilities, inspectors, and inspector training facilities concerning the inspection/maintenance program, and submit a copy of such notification to Plaintiffs.

4. *February 1, 1980.* Commence study to determine the quality control procedures as effective as the results of monthly on-site visits by the Commonwealth to inspect facilities, check instrument calibrations and inspect records. Such study shall consider the cost-effectiveness of the quality control procedures and include recommendations as to the frequency of periodic on-site visits and whether they should be supplemented by random on-site visits. Such study shall also examine the quality control programs recommended or used in other states with operating or proposed private garage systems.

5. *May 1, 1980.*

(A) Commence the certification of inspection facilities which meet the requirements of the adopted standards, procedures, and regulations of the inspection/maintenance program.

(B) Commence a program to train inspectors in the requirements of the inspection/maintenance program, the proper use of exhaust emission analyzer equipment, and inspection procedures, and to certify their proficiency and knowledge therein.

6. *August 1, 1980.* Submit study of quality control procedures, including recommendations and supporting data, to Plaintiffs for review and comment. Submit the Commonwealth's proposed modifications, if any, of the procedures adopted pursuant to paragraph 1 (D) of this schedule.

7. *November 1, 1980.* Commence a program to inform the public of the inspection/maintenance program. A detailed outline of this program shall be submitted to Plaintiffs by October 1, 1980.

8. *December 1, 1980.* Submit to Plaintiffs final modifications, if any, of the procedures adopted pursuant to paragraph 1 (D) of this schedule. Plaintiffs reserve the right to challenge any such procedures which are not as effective as the results of monthly on-site visits by the Commonwealth.

9. *January 1, 1981.* Submit to Plaintiffs adopted policies for providing, as a consumer protection mechanism, facilities where official confirming inspections may be conducted independent of certified private garages (i.e., at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of

other facilities at the sole discretion of PennDOT), or an equally effective alternative, such as timely consumer compliant investigations by Commonwealth employees. These employees would return to the inspection station in question with the complainant to verify the inspection procedures, to verify the calibration of the analyzer and to supervise the retest of the vehicle in question. These policies would be effective by November 1, 1981. Defendant PennDOT will maintain and make available to Plaintiffs such records as are adequate to demonstrate the effectiveness of this mechanism.

10. *May 1, 1981.* Commence the period of mandatory annual inspection and voluntary maintenance of all subject vehicles, all such vehicles to be inspected once by October 31, 1981, and commence a program to train mechanics in the proper means of repairing vehicles to meet the requirements of the inspection/maintenance program.

11. *November 1, 1981.* Commence the period of mandatory annual inspection of all subject vehicles and mandatory maintenance and re-inspection of all such vehicles which fail to meet the exhaust emission standards of the inspection/maintenance program prior to the expiration of the inspection period in which the subject vehicle is inspected, such inspection period to be no longer than three months.

12. *January 1, 1982.* Submit a report evaluating the effectiveness of the quality control procedures of the I/M program. Such report shall include a summary of the exhaust emission analyzer calibration data obtained by Defendant PennDOT from the on-site visits of official inspection stations and from the calibration reports submitted by the stations to Defendant PennDOT.

13. *January 1, 1983.* Submit a second report evaluating the effectiveness of the quality control procedures of the I/M program, as set forth in the preceding paragraph."

We hereby agree to the entry of the foregoing Modification of Consent Decree.

(s) James W. Moorman
James W. Moorman
Attistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

(s) Peter F. Vaira
Peter F. Vaira
United States Attorney
Philadelphia, Pennsylvania

(s) James S. Lanard
James S. Lanard
Delaware Valley Citizens'
Council for Clean Air
Counsel for Plaintiffs in C.A. 76-2068

(s) John Hrubovcak
John Hrubovcak, Counsel for
Pennsylvania Department
of Transportation

(s) Kenneth Reich
Kenneth Reich
Attorney for U.S. Department
of Justice

(s) Robert S. Forster, Jr.
Robert S. Forster, Jr.
Assistant United States Attorney
Philadelphia, Pennsylvania

(s) Jack J. Schramm
Jack J. Schramm
Regional Administrator
U.S. Environmental Protection
Agency, Region III

(s) Leonard Mangiaracina for
R. Sarah Compton
Director, Enforcement Division
U.S. Environmental Protection
Agency, Region III

(s) Robert B. Koegel
Robert B. Koegel
Attorney
U.S. Environmental Protection
Agency, Region III

(s) Keith Welks
Keith Welks, Counsel for
Pennsylvania Department of
Environmental Resources

(s) Benjamin R. Jackson
Deputy Assistant
Benjamin R. Jackson
Administrator for Mobile Source and
Noise Enforcement,
U.S. Environmental Protection Agency

(s) Jerome Balter
Jerome Balter
Public Interest Law
Center of Philadelphia

So Ordered this 7th day of March, 1980.

(s) Louis C. Bechtle
Louis C. Bechtle, *J.*